

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC JOHN KEANE,

Defendant-Appellant.

UNPUBLISHED

October 21, 2004

No. 248541

Muskegon Circuit Court

LC No. 02-047417-FH

Before: Neff, P.J., and Smolenski and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of solicitation of murder, MCL 750.157b(2). Defendant was sentenced as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of thirty to ninety years. We affirm.

I

This case stems from defendant's arrangements to have his former girlfriend and her eight-year-old daughter killed after defendant was charged with criminal sexual conduct (CSC) involving the daughter. Defendant attempted to arrange for the killings through other inmates at the Muskegon County jail. He detailed his plans in writings to others and drew maps to enable them to carry out the plans. Police eventually recorded a conversation about the desired killings between defendant and a police detective posing as a "hit man." Defendant allegedly believed that if his ex-girlfriend and her daughter were killed, there would be no one to testify against him in the CSC case and the charge would be dismissed.

II

Defendant first argues that the trial court erred in sustaining the prosecutor's objection to evidence that a key prosecution witness had attempted suicide at the county jail a few weeks after his alleged conversations with defendant about the murder solicitation. Defendant contends that the suicide attempt was relevant to the witness' state of mind and thus to his credibility.

This Court reviews the trial court's decision regarding the admission of evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). After receiving an offer of proof and hearing counsel's argument, the trial court sustained the prosecutor's objection to evidence of the witness' suicide attempt. The court determined that the

suicide attempt, which occurred after the witness was transferred to a different section of the jail, was too remote to shed light on the witness' credibility or his recall of the events involving defendant, MRE 401. The court also determined that the probative value of the evidence was substantially outweighed by the prejudicial effect, MRE 403.

Even if the trial court erred in ruling that the evidence was inadmissible, we find any error harmless. An evidentiary error does not merit reversal in a criminal case unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative.¹ *Lukity, supra* at 491, 495-496; *People v Albers*, 258 Mich App 578, 590; 672 NW2d 336 (2003). Defendant has failed to show that it is more probable than not that any error affected the outcome. *Id.*

It is unlikely that any error with regard to evidence of the witness' suicide attempt affected the outcome of the trial because the great weight of the untainted evidence supported the jury's verdict. *Lukity, supra* at 495; *Albers, supra*. The evidence against defendant was overwhelming. Two other former inmates testified concerning defendant's efforts to arrange the murder of his former girlfriend and her daughter. A police detective testified that defendant tried to arrange the murders during a telephone call in which the detective posed as a "hit man." This testimony was corroborated with physical evidence, including letters and maps that defendant prepared in regard to the murder arrangements and a tape recording of defendant's conversation with the detective arranging the murders, which was played for the jury. Given the untainted evidence, any error was harmless.

III

Defendant argues that he is entitled to resentencing because the trial court failed to state sufficient reasons to support an upward departure from the guidelines. We disagree.

A

A court may depart from the sentencing guidelines range if it has a substantial and compelling reason to do so, and it states on the record the reason for departure. MCL 769.34(3), *People v Babcock*, 469 Mich 247, 256, 272; 666 NW2d 231 (2003). Factors meriting departure must be objective and verifiable, must keenly attract the court's attention, and must be of considerable worth. *Id.* at 257-258. To be objective and verifiable, the factors must be actions or occurrences external to the mind and must be capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

The standard of review for sentences outside the guidelines is multi-faceted. *Babcock, supra* at 264-265. This Court must review the sentence to determine whether the particular departure was based on a substantial and compelling reason as articulated by the trial court. *Id.*

¹ To the extent that defendant argues that the error is constitutional in nature, defendant has failed to properly argue the merit of this claim. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

at 258-259, 272-273. The existence of a particular factor is a factual determination for the sentencing court to determine, subject to review for clear error. *Id.* at 264. The determination that a factor is objective and verifiable is reviewed as a matter of law. *Id.* The determination that a factor constituted a substantial and compelling reason for departure is reviewed for an abuse of discretion. *Id.* at 264-265. Likewise, the amount of the departure is reviewed for an abuse of discretion. *Abramski, supra* at 74.

An abuse of discretion exists when the sentence imposed is not within the range of principled outcomes. *Babcock, supra* at 269. In ascertaining whether the departure was proper, this Court must defer to the trial court's direct knowledge of the facts and familiarity with the offender. *Id.* at 270.

B

Defendant argues that the trial court's reasons for departure were already accounted for in the scoring and therefore cannot serve as a basis of departure. A court may not base a departure on an offense characteristic or offender characteristic already taken into account unless the court finds, based on the facts in the record, that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b), *People v Hendrick*, 261 Mich App 673, 682; 683 NW2d 218 (2004).

The statutory guidelines minimum sentence range was 135 to 281 months. The trial court imposed a minimum sentence of 360 months. The court completed a sentencing departure evaluation form, stating three grounds for the departure on the basis that they were given inadequate weight under the guidelines:

- (1) the solicitation to murder convictions involved the planned killing of two victims, plus the possibility that defendant's young son might be killed, plus the possibility that other children might be killed, plus the desire that a victim's boyfriend's legs be broken;
- (2) one of the intended victims of murder was an eight-year-old child;
- (3) the particularly squalid purpose of defendant's two solicitation of murder acts: after sexually penetrating an eight-year-old girl, defendant seeks the murder of the child victim and her mother to avoid conviction of the CSC charge.

In addition, in imposing sentence, the court discussed in more detail the factors justifying departure. The court cited the extraordinary amount of callousness and ruthlessness displayed in this incident in that defendant stated that if other children were involved in the killing, for instance if arson was the method of killing, that was okay, if that had to happen. Further, defendant indicated during the solicitations that he wanted his son² to live, but if his son had to die, that was okay because he had another son. Additionally, defendant indicated his desire that

² Defendant had two children with his former girlfriend, both of whom lived with her in addition to the child victim in this case.

if possible, his girlfriend's current boyfriend's legs should be broken. The court found particularly disturbing that defendant's plan involved the killing of an eight-year-old child, who is really quite helpless and quite innocent.

Finally, with regard to the "squalid and nefarious" purpose of defendant's deeds, the court noted that defendant solicited the murder of an eight-year-old child and her mother so he could protect himself from legal consequences after having sexually violated the child. Of concern to the court was not only the considerable psychological damage to the child and grief to the mother from the sexual assault, but also that defendant compounded the evil by trying to have them both killed to protect himself from the consequences of his first criminal act.

We find no error in the court's determination that the guidelines, and in particular the offense variables scored in this case, do not give adequate weight to the factors cited by the court. Offense variable (OV) 9, "Number of Victims," simply considers the number of victims, which in this case was scored at ten points for two to ten victims.³ It does not consider the age of the victims or the fact that defendant was willing to forego the lives of his own children in this plot. OV 10, "Exploitation of a Vulnerable Victim," was scored at fifteen points because predatory conduct was involved. Predatory conduct is defined as pre-offense conduct directed at a victim for the primary purpose of victimization. Although this offense variable addresses exploitation of a victim who is vulnerable, the variable does not encompass the particularly egregious circumstances in this case cited by the court, including defendant's disregard for three children's lives, including the lives of his own children as mere "bystanders" and an eight-year-old child that he had already exploited by the sexual assault.

OV 12, "Contemporaneous Felonious Criminal Acts," was scored at five points for a contemporaneous felonious criminal act involving a crime against a person. OV 13, "Continuing Pattern of Criminal Behavior," was scored at twenty-five points, because the pattern of felonious criminal activity involved three or more crimes against a person. These variables do not consider the particularly "squalid and nefarious" purpose of defendant's criminal activity that defendant planned to murder persons whom he had already victimized in a deplorable and egregious manner.

OV 19, Interference with the Administration of Justice, was scored at fifteen points on the basis that force or the threat of force was used against another person to interfere with the administration of justice. As with OV 12 and OV 13, this variable does not consider the particularly egregious, "evil," reason for the interference with justice, nor the deplorable consequences in this case. Defendant sought to kill the eight-year-old victim of his sexual assault, and her mother, and would additionally sacrifice the lives of his own children, to protect himself from the legal consequences of his sexual assault.

Finally, prior record variable (PRV) 6 was scored at fifteen points for commission of the offenses while defendant was in jail awaiting adjudication, and PRV 7 was scored at twenty points for two or more subsequent or concurrent felony convictions. These variables do not

³ Our analysis is based on the Michigan Sentencing Guidelines Manual, March 1, 2003.

compensate for the inadequate weight given to the abhorrent pattern of criminal activity undertaken by defendant. We concur with the court's conclusion that the statutory guidelines do not adequately account for the circumstances cited by the court. *People v Reincke (On Remand)*, 261 Mich App 264, 272; 680 NW2d 923 (2004).

Defendant further argues that even if the reasons for departure were valid, they did not support the extent of the departure, which was nearly thirty percent above the upper range of the guidelines. We disagree.

The articulated reasons justified the sentence imposed. The court cited substantial and compelling reasons for its upward departure, including objective and verifiable factors surrounding the solicitation of the murders. The court concluded that there was "an aroma of evil that floats above all this" to which the guidelines do not give proper numerical weight. The court's reasons justified the particular departure in this case. *Reincke, supra*. The outcome falls within the range of reasonable and principled outcomes and therefore was not an abuse of discretion. *Babcock, supra* at 269.

Affirmed.

/s/ Janet T. Neff

/s/ Michael R. Smolenski

/s/ Bill Schuette